

University of San Francisco and University of San Francisco Faculty Association, AFT, Local 4269, Case 20-CA-18245

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

Upon a charge filed by the University of San Francisco Faculty Association, AFT, Local 4269, the Union, 25 July 1983, the General Counsel of the National Labor Relations Board issued a complaint 9 August 1983 against University of San Francisco, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 27 April 1983, following a Board election in Case 20-RC-15479, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 19 July 1983 the Respondent has refused to bargain with the Union. On 17 August 1983 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On 15 December 1983 the General Counsel filed a Motion for Summary Judgment. On 21 December 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent's answer and its response to the Notice to Show Cause attack the validity of the certification on the basis of its contention that the unit here is inappropriate and based on its objections to the election in the representation proceeding. More specifically, the Respondent questions the appropriateness of the part-time faculty unit, the inclusion of clinical teaching assistants in the unit, the Regional Director's failure to conduct a hearing on its objections concerning the mail balloting and the alleged lack of a thorough investigation of its objections on the mail balloting and finally contends that the complaint fails to state an

adequate claim for relief under the Act. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 20-RC-15479, reveals that a petition for an election was filed 24 February 1982 after which a hearing was held. Following the hearing, the Regional Director transferred the case to the Board for decision. The Board thereafter issued a Decision and Direction of Election, 265 NLRB 1221 (1982), in which it found, contrary to the Respondent's contentions, that the following two units were appropriate for purposes of collective bargaining:

1. All part-time faculty members in the colleges of liberal arts, science, and business, and the schools of education and nursing, including clinical teaching assistants and all part-time academically closely related employees at locations throughout the State of California; excluding all full-time employees, College of Law employees and all other employees, guards and supervisors as defined in the Act.
2. All part-time faculty members in the college of professional studies at locations throughout the State of California; excluding all full-time employees, guards and supervisors as defined in the Act.

A secret-ballot election was thereafter conducted by U.S. mail under the supervision of the Regional Director for Region 20 between 14 January and 7 February 1983. The tally of ballots in the unit for liberal arts, science, business, and education and nursing showed that, of approximately 297 eligible voters, 85 cast ballots for and 61 cast ballots against the Union. There were 3 void ballots and 56 challenged ballots which were sufficient to affect the results of the election. Thereafter, the parties agreed to a resolution of all but 16 of the challenged ballots, and a revised tally of ballots showed 91 votes for and 69 votes against the Union, with 16 undetermined challenged ballots, a number insufficient to affect the results.¹

On 14 February 1983 the Respondent filed objections to the conduct of the election in the liberal arts unit which, inter alia, were directed at the appropriateness of the unit, and a claim that, through a clerical error, eligible voters did not receive properly addressed envelopes in which to return their ballots. Without conducting a hearing, on 27

¹ In the unit for part-time faculty in the college of professional studies, of approximately 235 eligible voters, 78 cast ballots for and 112 cast ballots against the Union, with 5 challenged ballots which were insufficient to affect the results. Neither party filed objections to this election, and the results were certified by the Regional Director.

April 1983 the Regional Director overruled the Respondent's objections in their entirety. Regarding the alleged improperly addressed envelopes, the Regional Director found that, at the ballot count, the return envelopes for three ballots had not been preaddressed to the Regional Office as they should have been, but had been forwarded by the Postal Service to the Board in Washington, D.C., which in turn forwarded them to the Region unopened and in time to be counted. The Respondent claimed that, because a large number of voters did not return ballots, there may have been other ballots similarly sent without complete return addresses and which may have been lost in the postal system or sent to some other location. In all the circumstances, however, the Regional Director found this claim about other ballots being lost to be mere speculation and not a basis for setting aside the election. The Regional Director also overruled the objections to the appropriateness of the unit, based on the Board's earlier Decision and Direction of Election, and certified the Union as the exclusive bargaining representative.

On 9 May 1983 the Respondent filed with the Board a request for review of the Regional Director's decision overruling its objections to the conduct of the election. The Respondent reiterated its allegations with regard to the inappropriateness of the unit and the possibility of other improperly addressed ballots. In addition, the Respondent took issue with the Regional Director's alleged failure to conduct a full investigation into the balloting procedure to determine whether there in fact were other errors on the part of the Regional Office. By Order of 15 June 1983, the Board denied the request for review, finding that it raised no substantial issues warranting review.

By letters dated 13 May and 1 July 1983, the Union requested that the Respondent commence bargaining with it as exclusive representative for the unit of part-time faculty in liberal arts, science, business, and education and nursing.² By letter dated 19 July, the Respondent acknowledged receipt of the 1 July bargaining demand and stated that "[a]s part-time faculty do not constitute an appropriate unit for collective bargaining, the University respectfully declines your request to bargain at this time."³

² While the complaint alleges that the Union's bargaining demand was dated 19 July, exhibits accompanying the Motion for Summary Judgment indicate that the Union's letter was dated 1 July, with 19 July being the date of the Respondent's refusal to bargain. The Respondent admits the accuracy of these exhibits.

³ In its answer, the Respondent denied that it has refused to bargain with the Union, but admitted its refusal in its response to the Notice to Show Cause. In addition, we reject the contention in the Respondent's answer that the complaint fails to state facts sufficient to constitute a claim for relief under the Act.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following⁴

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a private, nonprofit university with a main campus in San Francisco, California, and offices and classes located throughout the State of California, derived gross revenues in excess of \$1 million, excluding contributions which, because of limitation by the grantor, are not available for operating expenses, and purchased goods, materials, and supplies valued in excess of \$5000 directly from points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held between 14 January and 7 February 1983, the Union was certified 27 April 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All part-time faculty members in the colleges of liberal arts, science, and business, and the

⁴ Chairman Dotson did not participate in the underlying representation proceeding.

schools of education and nursing, including clinical teaching assistants and all part-time academically closely related employees at locations throughout the State of California; excluding all full-time employees, College of Law employees and all other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 13 May the Union has requested the Respondent to bargain, and since 19 July the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 19 July 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, University of San Francisco, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with University of San Francisco Faculty Association, AFT, Local 4269 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All part-time faculty members in the colleges of liberal arts, science, and business, and the schools of education and nursing, including clinical teaching assistants and all part-time academically closely related employees at locations throughout the State of California; excluding all full-time employees, College of Law employees and all other employees, guards and supervisors as defined in the Act.

(b) Post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with University of San Francisco Faculty Association, AFT, Local 4269 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All part-time faculty members in the colleges of liberal arts, science, and business, and the

schools of education and nursing, including clinical teaching assistants and all part-time academically closely related employees at locations throughout the State of California; excluding all full-time employees, College of Law employees and all other employees, guards and supervisors as defined in the Act.

UNIVERSITY OF SAN FRANCISCO